ing the streets under the control of a board of commissioners, intended to relieve the city from such liability. *Clair* v. *City of Manchester* (1903), — N.H. — 55 Atl. Rep. 935.

The principle is well established in New Hampshire, and was urged as a defense in this case, that street commissioners and boards of public works, elected or appointed under authority of law, are independent public officers, are not the agents of the city for which they act, and the city is not liable for their negligence. *Gross* v. *City of Portsmouth*, 68 N. H. 266; 33 Atl. Rep. 256, 73 Am. St. Rep. 586; *Hall* v. *City of Concord*, 71 N. H. 367, 52 Atl. Rep. 864, 58 L. R. A. 455. We have in this case, therefore, the somewhat incongruous situation of a city held liable for a defect in its streets occasioned by officers over whom it had no control, and which it had no apparent means of remedying by its own agents. The ground on which the liability is predicated is that the statutory obligation of towns and cities to build and maintain highways, vests in them an ownership in the highways and that ownership imposes upon them a duty towards the owners of adjoining land, which, so far as regards the consequences of their acts or omissions in building and repairing, is not to be distinguished from the duty of an ordinary adjoining proprietor of land with respect to the premises of his neighbor. *Gilman* v. *Laconia*, 55 N. H. 130, 20 Am. Rep. 175; *Haynes* v. *Town of Burlington*, 38 Vt. 350; *Bailey* v. *Mayor*, etc., 3 Hill 531, 2 Denio 431; *Eastman* v. *Meredith*, 36 N. H. 284. The city being charged with the duty, the law by implication confers upon it the power to employ a suitable agency. For a full discussion of the question of municipal liability for negligence see *Hill* v. *City of Boston*, 122 Mass. 344; *Howard* v. *City of Worcester*, 153 Mass. 426; *Barnes* v. *District of Columbia*, 91 U. S. 540; and SMITH ON MUN. CORP. §§ 786, 804, 806, 1172 and cases there cited.

SALES—CONDITIONAL CONTRACT TO SELL. By a contract with plaintiff, defendant was to be given possession of a safe, pay $321.00 rent thereof in six equal monthly installments and protect the safe from injury, removal or process. Plaintiff agreed that, upon full performance of the above conditions he would sell the safe to defendant for $1.00, but until such complete performance, title was to remain in plaintiff. In case of default in payment of a month's rent or in other of the said conditions plaintiff had a right to retake the safe, terminate the lease and retain all rent paid, after which defendant should have no claim on the safe. Defendant was also to keep the safe insured. Plaintiff sued to recover the first installment due under the contract. *Held*, this was a conditional sale. *Herring-Hall Marvin Co.* v. *Smith* (1903) — Ore. — 72 Pac. Rep. 704.

Had the court said that this was a conditional contract to sell, its language would have been more accurate. This is a form of that class of contracts popularly termed "installment contracts" or "conditional sales," whose purpose is "to facilitate sales and purchase upon credit and especially to avoid the publicity and statutory regulations of chattel mortgages." The United States Supreme Court has held that contracts, very similar to these but distinguishable therefrom, were absolute sales reserving a lien or constituting chattel mortgages. See *Hereford* v. *Davis*, 102 U. S. 235. The same results have been reached, however, in cases less readily distinguishable from conditional contracts to sell. See MECHEM ON SALES, §576; *Greer* v. *Church*, 13 Bush. (Ky.) 430; *Knittel* v. *Cushing*, 57 Texas 354, 44 Am. Rep. 598. The decision in *Greer* v. *Church*, especially, seems to directly conflict with the Oregon holding. Also, contracts in form conditional contracts to sell, have been held to be chattel mortgages in a considerable number of

cases. See *Beardsley* v. *Beardsley*, 138 U. S. 262; *Andrew* v. *Colorado Savings Bank*, 20 Colo. 313, 36 Pac. Rep. 902, 36 Am. St. Rep. 291. Contracts substantially the same as that in the Oregon case, have been held to be sales upon condition subsequent. *Murch* v. *Wright*, 46 Ill. 487, 95 Am. Dec. 455. And see *Gerow* v. *Costello*, 11 Colo. 560, 19 Pac. Rep. 505; *Day* v. *Bassett*, 102 Mass. 445. In *Southern Music Co.* v. *Dusenbury*, 27 S. C. 464, 4 S. E. Rep. 60, apparently the same thing was held to be a lease with an option in the lessee to become the owner. However, the weight of authority is with the Oregon case.

SALES—IMPLIED WARRANTY—SECOND HAND MACHINERY. The defendant ordered a second hand engine "known as Divine Engine, No. 1865," of plaintiff, who was a manufacturer of new and a dealer in old machinery not of his manufacture. The sale contract appeared on a printed blank form and by the form was made subject to a warranty printed thereon. It was expressly stated, however, in the printed warranty that such warranty did not apply to second hand machinery. Defendant bought the engine for the purpose, communicated to seller, of running his threshing machine therewith. In this purpose the engine failed through patent defects. In an action brought by plaintiff for the price, *Held*, the statement in the printed warranty that it did not apply to second hand machinery, did not preclude an implied warranty that the engine was fit and suitable for the purpose for which it was bought. *New Birdsall Co.* v. *Keyes* (1903), — Mo. — 74 S. W. Yep. 12.

Since this warranty arises from the nature of the transaction and the relation of the parties without express words or even actual intention, it will remain as part of seller's obligation unless in some way expressly excluded. MECHEM ON SALES, §1258. The court's construction that the implied warranty in this case was not excluded by the language, seems to be correct, though the parties, or at least the seller, clearly intended to expressly exclude all warranties. The court erroneously states the rule thus: "In a sale of personal property for a specific purpose, there is an implied warranty that it is fit and suitable for that purpose." This excludes one of the essential conditions of the rule, viz., the seller must have been relied upon to supply an article to suit the buyer's purpose, no specific chattel being contemplated. See MECHEM ON SALES, § 1344, citing cases, *ibid.* §§ 1345 and 1349. BENJAMIN ON SALES, (7th Am. Ed.), p. 646, for expressions of the true rule. From the report of the case under discussion the specific respects in which the engine was defective do not appear. It would seem that if it were a sufficient second hand Divine Engine, No. 1865. as such, though this particular kind of engine were not suitable for running threshing machines, that implied warranty would not attach inasmuch as the buyer would have gotten what he had particularly designated. See MECHEM ON SALES, §§ 1349 and 1355; cases in note, p. 689 in BENJAMIN ON SALES (7th Am. Ed.) and § 657 of the latter. Clearly this would be so where the parties both knew what was meant by such particular designation. See *Morris* v. *Bradley Fertilizer Co.*, 64 Fed. Rep. 55. *Chantor* v. *Hopkins*, 4 M. & W. 399. In apparent conflict with the Missouri decision, appears in MECHEM ON SALES, § 1348, the following: "It is said also that the warranty will not attach where the article e. g., machinery is expressly sold as a second hand article," referring to the implied warranty in question. But it cannot have been intended, it seems, by this that where all the conditions essential to the rule (See Mechem on Sales, § 1344, above referred to) are present in the sale of a chattel, the mere additional fact that the article was expressly sold as a second hand article would preclude an implied warranty of fitness for an intended use. Nor do the cases cited under the proposition support it if we presume that the above construction was intended.